Supreme Court, U.S.
FILED

09-385 SEP 28 2009

No. OFFICE OF THE CLERK

In The Supreme Court of The United States

BAKERY MACHINERY & FABRICATION, INCORPORATED,

Petitioner,

v.

TRADITIONAL BAKING, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether this Court should review, and ultimately, reverse the decision of the Court of Appeals for the Seventh Circuit that effectively read Fed.R.Civ.Pro. 60(b)(6) out of existence. The Court of Appeals held the plaintiff herein was not entitled to relief from a default judgment even though it recognized that the plaintiff's attorney neglected the case, the attorney deceived plaintiff about the status of the case, and where the Court acknowledged that the plaintiff was diligent in litigating the case and wholly innocent of any wrongful act that resulted in the half million dollar default judgment and loss of his own substantial cause of action.

CORPORATE DISCLOSURE STATEMENT

Plaintiff Bakery Machinery & Fabrication, Inc. is an Illinois corporation. There is no parent corporation. No publicly held company owns more than 10% of its stock.

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The order of the District Court denying without prejudice the defendant's motion for default is not reported and is contained in pages 35-36 of the Appendix. The order of the District Court granting the defendant's petition for fees and costs is not reported and is contained in pages 31-34 of the Appendix. The order of the District Court admonishing plaintiff's counsel to comply with electronic filing rules is not reported and is contained in pages 29-30 of the Appendix. The order of the District Court granting in part the defendant's motion to strike pleadings and for entry of default is not reported and is contained in pages 21-28 of the Appendix. The order of the District Court striking plaintiff's pleadings, entering a default, and awarding sanctions and fees is not reported and is contained in pages 19-20 of the Appendix. The order of the District Court entering default judgment against plaintiff is not reported and is contained in pages 17-18 of the Appendix. The order of the District Court denying the plaintiff's motion to vacate the order striking pleadings and entering default, and to vacate the default award is not reported and is contained in pages 10-16 of the Appendix. The citation for the decision of the United States Court of Appeals affirming the District Court is 570 F.3d 845 (7th Cir. 2009), and it is contained in pages 1-9 of the Appendix.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals was issued on Monday, June 29, 2009. Ninety days after this date is Sunday, September 27, 2009, so the deadline to file the petition is extended to Monday, September 28, 2009. This petition is filed on September 28, 2009, and therefore this Court has jurisdiction under 28 U.S.C. § 2101(c). Supreme Court Rule 11 does not apply.

RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 60 states as follows:

> (a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.
>
> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment,

order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
(4) the judgment is void;
(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.
(c) Timing and Effect of the Motion.
(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.
(d) Other Powers to Grant Relief. This rule does not limit a court's power to:
(1) entertain an independent action to

relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655; to a defendant who was not personally notified of the action; or
(3) set aside a judgment for fraud on the court.
(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

BASIS FOR JURISDICTION IN THE COURT OF APPEALS

Plaintiff Bakery Machinery & Fabrication, Inc. is an Illinois corporation with its principal place of business in Illinois, and defendant Traditional Baking, Inc. is a California corporation with its principal place of business in California. Plaintiff filed suit in Illinois state court seeking damages in excess of $250,000, and defendant removed the case to the Northern District of Illinois based upon diversity jurisdiction under 28 U.S.C. § 1332. Defendant then filed a counterclaim.

On October 25, 2007, the District Court struck all of plaintiff's pleadings. On November 20, 2007, the District Court entered a default judgment for defendant on defendant's counterclaim in the amount of $582,000. On December 14, 2007, and pursuant to Federal Rule of Civil Procedure 60(b),

plaintiff filed a timely motion to vacate this default judgment. The District Court denied this motion on April 15, 2008. Judgment was entered on April 15, 2008, and this judgment disposed of all of the parties' claims. This judgment was final and appealable pursuant to 28 U.S.C. § 1291. Plaintiff timely filed a notice of appeal two days later, on April 17, 2008, within the thirty day time period set forth in Federal Rule of Appellate Procedure 4(a)(1)(A).

STATEMENT OF THE FACTS

Cloyd Barnes, Jr., is the President of Bakery Machinery & Fabrication, Inc. In April of 2003, Bakery Machinery and Traditional Baking, Inc. entered into a contract. In 2006, Bakery Machinery filed a breach of contract lawsuit, alleging Traditional Baking owed in excess of $252,000. Attorney James Hinterlong filed this complaint on behalf of Bakery Machinery. The case was assigned to District Judge Lefkow and Magistrate Valdez. In September of 2006, the District Court Clerk mailed an attorney appearance form to Mr. Hinterlong, but Hinterlong did not file an appearance. Hinterlong did not have legal malpractice insurance.

Traditional Baking filed an answer and counterclaim. In December of 2006, a scheduling order was entered that set a Rule 26(a)(1) disclosure deadline of January 10, 2007, and set a non-expert discovery cut-off date of May 31, 2007. Attorney Hinterlong failed to make any Rule 26(a)(1)

disclosure on behalf of Bakery Machinery by the January 10 deadline.

On January 25, 2007, Magistrate Valdez conducted a settlement conference that was attended by the parties and their respective counsel. A second settlement conference was held on February 9, but no settlement was reached. On February 16, 2207, Judge Lefkow granted the parties leave to amend their respective pleadings by February 28, 2007, and ordered that responses to these amended pleadings be filed by March 14, 2007. Traditional Baking timely filed an amended counterclaim, but attorney Hinterlong failed to file a response by the March 14 deadline.

On March 15, 2007, Traditional Baking's counsel wrote Hinterlong to memorialize their telephone conversation of that date. In this conversation, Hinterlong claimed not to have received the amended counterclaim, Hinterlong admitted he still had failed to make any Rule 26(a)(1) disclosure, and Hinterlong indicated he would answer the counterclaim and make the disclosure by March 27, 2007. Later, and on March 26, 2007, Traditional Baking's counsel wrote Hinterlong to memorialize their telephone conversation of that date, and in this second conversation Hinterlong stated he could not file an answer or make the disclosures because of computer problems. On March 27, 2006, Hinterlong stated he would make the disclosures on April 2.

Hinterlong failed to make any Rule 26(a)(1) disclosures, so on April 4 Traditional Baking filed a motion to compel and for sanctions. Traditional Baking also filed a motion for default because of Hinterlong's failure to file an answer to Traditional Baking's amended counterclaim. Hinterlong filed an answer to the amended counterclaim on April 17, but this was not filed electronically.

These motions were presented to the District Court on April 17, 2007, which granted Traditional Baking's motion to compel, continued the motion for sanctions so Traditional Baking could file a fee petition, denied Traditional Baking's motion for default without prejudice, and extended the discovery deadline to June 29, 2007. Traditional Baking filed a fee petition in May of 2007, and also in May the District Court extended the discovery deadline to July 31, 2007 and referred the matter to Magistrate Valdez for settlement negotiations. On June 13, 2007, Hinterlong filed a response to the fee petition which he again did not file electronically.

The District Court granted Traditional Baking's fee petition on June 25, 2007, and awarded fees of $1,375.00. The District Court stated Bakery Machinery "has not demonstrated that its non-disclosure and its disobedience of the court were substantially justified." The District Court also stated:

> BMF's counsel [Hinterlong] is directed to serve a copy of this order on his client's agent principally responsible

> for this litigation. The court expects that, unless the default is fairly attributable to the client . . . the cost of this award will not be imposed on the client but rather will be borne by counsel.

Hinterlong did not provide this order to Cloyd Barnes, Jr., the President of Bakery Machinery. In July of 2007, Hinterlong filed a motion to extend the discovery cut-off deadline, and yet again he did not file this motion electronically. The District Court granted this motion and extended the deadline to August 24, 2007, and stated "plaintiff's counsel [Hinterlong] is reminded to comply with the Court's General Order on Case Filing, November 16, 2004, as amended," which requires that all documents be filed electronically.

On August 18, 2007, Cloyd Barnes was deposed. On August 23, 2007, Traditional Baking's President was deposed by telephone, and Barnes participated in this deposition. On August 28, Magistrate Valdez conducted a settlement conference in which Barnes was available by telephone.

On September 6, 2007, Traditional Baking filed a motion to strike Bakery Machinery's pleadings, to default Bakery Machinery, and for sanctions. This motion stated the fee award from the first default motion had not been paid, and stated Hinterlong had never filed an appearance. Hinterlong filed a response on September 21, and

even though the District Court had admonished Hinterlong to comply with the electronic filing requirements, Hinterlong did not file this response electronically.

The District Court ruled on September 24, 2007, and first stated "Hinterlong has unreasonably failed to file an appearance. . . . Hinterlong does not deny that he has failed to file an appearance nor does he offer any excuse for having failed to do so." The District Court then stated:

> Hinterlong has unreasonably failed to comply with the court's General Order on Electronic Case Filing. . . . Hinterlong does not deny that he has failed to comply with the court's General Order on Electronic Case Filing after having been admonished by the court to do so. . . . Neither does he give an explanation or excuse for having failed to do so."

Finally, the District Court stated "Hinterlong does not deny, and therefore tacitly admits, disobedience [of the District Court's prior orders]. The court finds that he has not paid a court-ordered sanction." The District Court stated all documents Hinterlong had filed on behalf of Bakery Machinery would be stricken without leave to refile unless, by October 24, 2007, Hinterlong files an appearance; Hinterlong pays a $50 sanction for failing to file an appearance; Hinterlong pays the $1,375 fee award; and Hinterlong registered with the court to file

documents electronically. The District Court allowed Traditional Baking leave to file a fee petition by October 15, allowed Hinterlong to respond by October 25, and set a status date of October 25, 2007.

Traditional Baking filed a fee petition on October 15, 2007, but Hinterlong did not file a response. In fact, Hinterlong took none of the action the District Court had demanded. Further, Hinterlong did not appear at the October 25 status date. Accordingly, the District Court struck all of Bakery Machinery's pleadings, entered a default against Bakery Machinery, awarded $2,787.98 in fees to Traditional Baking, and set a trial date to determine the damages under Traditional Baking's amended counterclaim.

On November 7, 2007, Traditional Baking filed a motion for a default judgment. Hinterlong filed a response on November 20, but yet again Hinterlong did not file this response electronically. This response contained no explanation of why Hinterlong had failed to comply with the District Court's directives from September 24 regarding the action Hinterlong had to take in order to prevent the striking of Bakery Machinery's pleadings without leave to refile. Also on November 20, Hinterlong filed a hand written application to appear *pro hac vice* on behalf of Bakery Machinery. The District Court granted Traditional Baking's motion and entered judgment for Traditional Baking in the amount of $582,000.

On December 14, 2007, Hinterlong filed a motion to vacate the default judgment, and yet again Hinterlong did not file this motion electronically. In this motion, Hinterlong provided no explanation of why he failed to comply with the District Court's directives from September 24 regarding the action Hinterlong had to take by October 25 in order to prevent the striking of Bakery Machinery's pleadings without leave to refile.

On January 23, 2008, Cloyd Barnes received a notice from the County Recorder that Traditional Baking had recorded the default judgment. This notice was the very first time Barnes learned of the entry of the default judgment. Bakery Machinery retained Novoselsky Law Offices as new counsel, and on January 30, 2008, new counsel filed a motion to substitute and to temporarily stay the proceedings. This motion was supported by an affidavit executed by Barnes which stated in part:

> for the past nine months, every time I asked my attorney [Hinterlong] what the status of this case was, I was told that everything was going along well. . . . I have never seen that order [of June 25, 2007 regarding what Hinterlong had to do to prevent the striking of Bakery Machinery's pleadings], nor any of the other orders attached as exhibits to that pleading [Traditional Baking's response to the motion to vacate the default judgment]. The first I knew of a

> default judgment being entered against my company was January 23, 2008, when I received by mail a copy of a certified judgment against my company.

The District Court denied the motion to vacate. The District Court noted Hinterlong had never explained his repeated failures to comply with the orders of June 13 and September 24, 2007, and then stated "the court is constrained to conclude that Mr. Hinterlong's actions leading to the default judgment . . . were willful," and as a result Bakery Machinery's "motion to vacate must be denied." The court of appeals affirmed. The court of appeals held:

> the rule is that *all* of the attorney's misconduct (except in the cases where the act is outside the scope of employment or in cases of excusable neglect) becomes the problem of the client. . . . Deception of a client becomes the liability of the client's attorney and not the client's opponent.

SUMMARY OF ARGUMENT

The decision of the court of appeals that an attorney's deception of a client will never warrant relief under Fed.R.Civ.Pro. 60(b)(6) will punish innocent clients in cases before every appellate circuit and every District Court, and will concomitantly provide a windfall to opposing parties who otherwise were prepared to litigate cases on

their substantive merits. The decision of the court of appeals is fundamentally unjust because it ignores the unique trust a client places in an attorney, and it ignores that a lay client is unable to look over the attorney's shoulder and verify that the attorney is litigating the case properly. Under the unique circumstances of this case, in which Bakery Machinery was affirmatively deceived by its attorney, the attorney utterly neglected the case, and Bakery Machinery was diligently litigating the case, the court of appeals should have applied Rule 60(b)(6) to vacate the default judgment against Bakery Machinery. This Court should grant this petition and reverse the court of appeals.

ARGUMENT

Fed.R.Civ.Pro. 60(b)(6) states "on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons . . . any other reason that justifies relief." Rule 60(b)(6) had previously been invoked to provide relief when an attorney deceives a client and the client has been diligent in litigating the case. For example, in *In Re Robenson*, 124 B.R. 757 (N. D. Ill. 1991), the debtor transferred her home to Thomas Fitzgerald subject to the debtor's retaining a life estate in the property. *Robenson*, 124 B.R. at 757. A dispute arose regarding the debtor's interest, and a state court ruled the debtor had a rental interest for life in the property. *Id.* The debtor later filed for bankruptcy and was represented by attorney Ernesto Borges. *Id.* The bankruptcy court lifted the bankruptcy stay and

allowed Fitzgerald to evict the debtor, and Borges told the debtor he would file an emergency motion to reinstate the stay and appeal from the order lifting the say. *Id.* However, Borges did nothing and instead told the debtor the motion and the appeal were both denied. *Id.*

During this time, the debtor was periodically calling Borges to inquire about the status of the case, and Borges told the debtor he was taking all necessary steps to handle her case. *Robenson*, 124 B.R. at 757-58. In fact, both the appeal from the lifting of the stay and the bankruptcy case itself were dismissed for want of prosecution in 1988, but the debtor did not learn of these dismissals until 1989. *Id.* at 758. The debtor filed a motion to vacate the dismissal of the appeal, and the bankruptcy court granted this motion. The court stated:

> This court finds that the facts presented in this case mandate relief pursuant to Rule 60(b)(6) for two reasons. First, Ms. Robenson was as diligent as she could be, calling her attorney frequently to check the status of her case. A client is not and should not be expected to double-check the information her attorney gives her about her case. The attorney-client relationship is based upon trust-one doesn't hire an attorney unless one believes that one can trust that person to vigorously (or at least adequately) pursue one's cause. Mr. Borges neglect,

> as detailed by Ms. Robenson, was certainly not excusable - it was unconscionable. These facts justify the extraordinary remedy of relief under Rule 60(b)(6).
>
> There is a second justification for Rule 60(b)(6) relief. Ms. Robenson's hope (one which is not necessarily unreasonable based on the facts before the court) is that she will successfully appeal the bankruptcy court's order and regain an interest in the home she lost to Mr. Fitzgerald. An attorney malpractice action could not accomplish that end and it is clear that Ms. Robenson's opinion is that money damages would not adequately compensate her for the (allegedly unjust) loss of her home of many years.

In Re Robenson, 124 B.R. at 759.

Just as the *Robenson* court held the debtor was as diligent as she could be by calling her attorney to check on the status of her case, in this case Bakery Machinery was as diligent as it could be because its President Cloyd Barnes personally participated in three settlement conferences and Barnes periodically called attorney Hinterlong to check on the status of the case. Just as the attorney in *Robenson* deceived the debtor by stating he was taking all of the necessary steps in the case, in this case Hinterlong affirmatively deceived Bakery

Machinery by repeatedly stating to Barnes that the case was progressing well. Just as the *Robenson* court held a client should not have to double-check the information provided to her by her attorney, in this case Bakery Machinery should not have been expected to double check the veracity of Hinterlong's repeated statements that this case was progressing well. Just as the *Robenson* court held the conduct of the debtor's attorney was unconscionable, in this case Hinterlong's conduct likewise is unconscionable. Just as the *Robenson* court held all of these facts justified relief under Rule 60(b)(6), the facts of this case likewise justify relief under Rule 60(b)(6) in the form of vacating the default judgment against Bakery Machinery. *See also Inryco, Inc. v Metropolitan Engineering,* 708 F.2d 1225, 1234 (7th Cir. 1983) ("default judgments are not meant for disciplining a member of the bar at the expense of a litigant's day in court").

Nor does *Robenson* stand alone in holding that attorney deception of a diligent client is a sufficient basis for providing relief under Rule 60(b)(6). *See, e.g., Boughner v Secretary of Health, Education, and Welfare,* 572 F.2d 976 (3d Cir. 1978) (court affirms the grant of Rule 60(b)(6) relief when attorney's "neglect was so gross that it was inexcusable"); *Jackson v Washington Monthly,* 569 F.2d 119, 122 (D.C. Cir. 1978) ("we in this circuit have held that so serious a dereliction by an attorney, when unaccompanied by a similar default by the client may furnish a basis for relief under Rule 60(b)(6) . . . That is the more so where, as

apparently here, little if any prejudice has befallen the other party to the litigation").

In addition, just as the *Robenson* court held a legal malpractice action would not assist the debtor in obtaining the interest in her home she had lost because of the attorney's unconscionable misconduct, in this case a legal malpractice action will not assist Bakery Machinery in obtaining the $252,000 judgment that was sought in Bakery Machinery's complaint. Nor will a legal malpractice action assist Bakery Machinery in recovering the $582,000 judgment Traditional Baking obtained on its counterclaim, because Hinterlong does not have malpractice insurance.

The court of appeals relied upon this Court's statement in *Link v Wabash R. Co.,* 370 U.S. 626, 633 (1962), that "petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." *See Bakery Machinery v Traditional Baking,* 570 F.3d 845, 849 (7th Cir. 2009). However, in *Link* this Court also stated "clients have been held to be bound by their counsels' inaction in cases in which the inferences of conscious acquiescence have been less supportable than they are here." *Link,* 370 U.S. at 634 n.10. By contrast to *Link,* in this case there is no inference of Bakery Machinery's acquiescence in attorney Hinterlong's stunning neglect of this case. To the contrary, Bakery Machinery was unaware of Hinterlong's misconduct, against because Hinterlong was actively deceiving Bakery Machinery about the

status of the case. *Link* therefore does not preclude the application of Rule 60(b)(6) to this case. This Court should grant this petition and reverse the court of appeals.

Although in the grand scheme of things, and recognizing that the Docket of this Court is crowded and the time of its members is limited by consequence, the issue in this matter may seem less significant than others seeking review, the matter here addresses a very important procedural matter dealing with how the lower courts under this Court's supervision should apply the Federal Rules of Civil Procedure. It also raises an even more fundamental issue: Justice is blind, meaning that it is even-handed and treats all parties fairly and equally. But Justice should not be unseeing and indifferent. It should not ignore the obvious inequity of punishing a wholly innocent party, for the sins of another. Justice should not be sacrificed on the altar of expediency, nor should it be sacrificed in the name of the fiction that a lay client can and should monitor how the attorney is litigating the case or have reason to suspect that every statement made by the lawyer is a lie. The integrity of the judicial system is based in large part on the belief that the courts will ensure that justice is done. Justice has not yet been done in this case. This Court should grant this petition and reverse the Court of Appeals.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that this Court grant its petition and allow review of this matter.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 08-1967

BAKERY MACHINERY & FABRICATION, INCORPORATED,

Plaintiff-Appellant,

v.

TRADITIONAL BAKING, INCORPORATED,

Defendant-Appellee.

Appeal from the Unit- ' States District Court
for the Northern District of Illinois,
Eastern Division.
No. 1:06-cv-05150—Joan Humphrey Lefkow, *Judge.*

ARGUED FEBRUARY 11, 2009—
DECIDED JUNE 29, 2009

Before BAUER, RIPPLE and WOOD, *Circuit Judges.*

BAUER, *Circuit Judge.* This case is an example of how the sins of a lawyer can be visited upon the client. In a contract dispute between Bakery Machinery & Fabrication (BMF), an Illinois corporation, and Traditional Baking, Incorporated (TBI), a California corporation, the district court entered default judgment against BMF and denied

BMF's motion to vacate the default. On appeal, BMF argues that the judgment should be vacated under Federal Rule of Civil Procedure 60(b)(6). We disagree; the record does not warrant vacating the default judgment. Therefore, we affirm the district court's denial.

I. BACKGROUND

BMF hired attorney James Hinterlong to sue TBI in an Illinois court over a contract dispute. TBI successfully removed the lawsuit to the district court on diversity of citizenship grounds. Although the court clerk mailed Hinterlong an appearance form, Hinterlong failed to file an appearance.

TBI answered the complaint and counterclaimed. The district court entered a scheduling order that required Rule 26(a)(1) disclosures to be filed by January 10, 2007. Hinterlong did not file the disclosures by the deadline.

The district court then ordered that any amended pleadings be filed by February 28, 2007, with responses to be filed by March 14, 2007. Hinterlong did not file an amended complaint, but TBI filed an amended counterclaim on February 28, 2007. Hinterlong failed to respond to TBI's amended counterclaim by March 14, 2007.

TBI informed Hinterlong that he had not addressed the amended counterclaim; Hinterlong responded that he had not seen the amended

counterclaim. Although there is a dispute as to whether Hinterlong had received a copy of the amended counterclaim, TBI sent, and Hinterlong received, another copy. Hinterlong agreed to file an answer to the counterclaim and make his Rule 26 disclosures by March 27, 2007. In the event, Hinterlong filed neither an answer nor disclosures by that date; the district court then ordered that he respond by April 2, 2007. Once again, he failed to do so.

TBI then moved for default judgment based on BMF's failure to comply with the district court's order of March 27, 2007, and also moved for sanctions and an order to compel BMF to serve its tardy Rule 26 disclosures. In response to the default motion, Hinterlong filed (albeit not electronically in accordance with the court's General Order on Case Filing) an answer to TBI's amended counterclaim.

On April 17, 2007, the district court granted TBI's motion to compel and continued TBI's motion for sanctions until May 29, 2007. The district court also denied, without prejudice, TBI's motion for default judgment.

On June 25, 2007, the district court granted TBI's motion for sanctions in the amount of $1,375.00. The district court also ordered Hinterlong to deliver a copy of the sanctions order to BMF which included the statement that "unless the default is attributable to the client . . . the cost of this award will not be imposed on the client but rather will be borne by counsel."

Hinterlong did not provide the order to BMF.

TBI then filed a 73-item request for admission of facts and the genuineness of documents, which Hinterlong never answered.

On September 6, 2007, TBI moved to strike BMF's pleadings, for a default judgment against BMF, and additional sanctions; Hinterlong responded, although not electronically. The district court, on September 24, 2007, ordered Hinterlong to file an appearance, pay a sanction for his failure to file an appearance on time, pay the un-paid sanctions ordered on June 25, 2007, and explain why he had failed to file electronically. The district court noted that "Hinterlong has unreasonably failed to comply with the court's General Order on Electronic Case Filing... Hinterlong does not deny that he has failed to comply with the court's General Order on Electronic Case filing after having been admonished by the court to do so." The district court warned Hinterlong that if these orders were not complied with by October 24, 2007, all of BMF's pleadings would be stricken without leave to re-file and that the court would consider TBI's motion for default on October 25, 2007.

Hinterlong did not comply with the district court's September 24, 2007 orders and failed to appear before the court on October 25, 2007. The district court then struck all of BMF's pleadings without leave to re-file; granted TBI's motion for default on its amended counterclaim against BMF; and set a date to determine TBI's damages under the amended

counterclaim.

On November 7, 2007, TBI moved for entry of judgment against BMF on the issue of damages based on supporting affidavits. On November 20, 2007, Hinterlong filed a response, but again not electronically, and failed to explain his failure to comply with any portion of the September 24, 2007 order. That same day, the district court granted TBI's default motion and entered judgment against BMF in the amount of $582,000.00.

On December 14, 2007, Hinterlong moved to vacate the order striking BMF's pleadings, and the default award in favor of TBI. TBI timely responded, but BMF did not reply by the deadline of January 11, 2008.

On January 23, 2008, BMF was informed, purportedly for the first time, that a default judgment had been entered and recorded against it. A week later, BMF moved to substitute its counsel and stay all proceedings. In support of the motion, BMF asserted that for the previous nine months, every inquiry it made of Hinterlong concerning the status of the litigation was answered with his assurance that it was "going well." The district court granted the motion.

On February 19, 2008, BMF moved for leave to file a reply in support of its motion to vacate, originally filed by Hinterlong, citing Hinterlong's repeated inactions. TBI objected and argued that the reply was to have been filed by January 11, 2008 and that BMF's

motion made new arguments—matters not made in the original motion to vacate—about Hinterlong's performance. Although the district court granted BMF's motion for leave to file, it indicated that it would disregard any new facts and arguments inappropriate for a reply brief.

The district court denied BMF's motion to vacate on April 15, 2008. It found that Hinterlong had never explained his repeated failures to comply with the court's orders and that his actions were willful and did not warrant relief under Fed. R. Civ. P. 60(b)(1). The district noted that, except for excusable neglect, a party is held to the conduct of its attorney.

This timely appeal followed.

II. DISCUSSION

On appeal, BMF argues that the district court erred when it denied BMF's motion to vacate the default judgment. Specifically, BMF argues that the residual provision of Fed. R. Civ. P. 60(b)(6) allows this relief on equitable grounds. We review the district court's denial of a motion to vacate a default judgment only for an abuse of discretion. *e360 Insight v. Spamhaus Project*, 500 F.3d 594, 598 (7th Cir. 2007). "Abuse of discretion in denying a 60(b) motion is established only when no reasonable person could agree with the district court; there is no abuse of discretion if a reasonable person could disagree as to the propriety of the court's action." *Williams v. Hatcher*, 890 F.2d 993, 995 (7th Cir. 1989). The district

court has great latitude in making a Rule 60(b) decision because that decision "is discretion piled on discretion." *Swaim v. Moltan Co.*, 73 F.3d 711, 722 (7th Cir. 1996) (citing *Tolliver v. Northrop Corp.*, 786 F.2d 316, 319 (7th Cir. 1986).

Rule 60 of the Federal Rules of Civil Procedure "regulates the procedure for obtaining relief from final judgments." *Arrieta v. Battaglia*, 461 F.3d 861, 864 (7th Cir. 2006). Under the "catchall" provision of Rule 60, a district court may reopen a judgment "for any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). As a general rule, "relief from a judgment under Rule 60(b) is an extraordinary remedy and is granted only in exceptional circumstances." *Reinsurance Company of America, Inc. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1277 (7th Cir. 1990) (citation omitted); *see also Arrieta*, 461 F.3d at 865 ("Relief under Rule 60(b)(6) requires a showing of extraordinary circumstances justifying the reopening of a final judgment...") (internal quotations and citations omitted).

BMF argues that the district court erred by denying its motion to vacate the default judgment under the residual provision of Fed. R. Civ. P. 60(b)(6). BMF points out that its appeal is not a typical Rule 60(b)(1), "bad attorney" case; rather, Hinterlong's actions provided the exceptional circumstances necessary for relief because more than simple misconduct is present. Citing *In re Robenson*, 124 B.R. 757 (N.D. Ill. 1991), where Rule 60(b)(6) relief was granted based on client diligence and unconscionable attorney neglect, BMF argues that Rule 60(b)(6) relief

should have been awarded because Hinterlong affirmatively deceived a diligent BMF about the litigation's status.

The problem with this argument is that three years after *Robenson*, we drew a clear line in *United States v. 7108 West Grand Avenue*, 15 F.3d 632, 634 (7th Cir. 1994) when we said that "[t]he clients are principals, the attorney is an agent, and under the law of agency the principal is bound by his chosen agent's deeds." The rule is that *all* of the attorney's misconduct (except in the cases where the act is outside the scope of employment or in cases of excusable neglect) becomes the problem of the client. *See id.* A lawyer who inexcusably neglects his client's obligations does not present exceptional circumstances. *See Williams*, 890 F.2d at 996. Hinterlong's actions, even with BMF's purported diligence, do not fall within the exceptions to the rule and do not rise to the level of "exceptional" to warrant such "extraordinary" relief.

BMF's beef is against Hinterlong, not the court's ruling on the case. Deception of a client becomes the liability of the client's attorney and not the client's opponent. *See Tolliver*, 786 F.2d at 319 ("Holding the client responsible for the lawyer's deeds ensures that both clients and lawyers take care to comply. If the lawyer's neglect protected the client from ill consequences, neglect would become all too common."). Since clients must be held accountable for their attorney's actions, it does not matter where the actions fall between "mere negligence" and "gross misconduct." *See 7108 West Grand Avenue*, 15 F.3d at 635.

"Malpractice, gross or otherwise, may be a good reason to recover from the lawyer but does not justify prolonging litigation against the original adversary." *Id.* at 633. *See United States v. Di Mucci*, 879 F.2d 1488, 1496 (7th Cir. 1989) ("It seems clear to us that the law in this circuit is that an attorney's conduct must be imputed to his client in *any* context.") (emphasis in original).

BMF has sued its lawyer, but was unfortunately welcomed with, not surprisingly, Hinterlong's lack of malpractice insurance. From our reading of the case, this is the "exceptional circumstance" that BMF suffers: that it cannot recover from an uninsured Hinterlong. This reason, though, does not deem the district court's denial of the motion to vacate an abuse of discretion under Rule 60(b)(6); BMF voluntarily *chose* Hinterlong, without, presumably, inquiring into his insured status. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 (1962) ("Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation...").

III. CONCLUSION

For these reasons, we find that the district court did not abuse its discretion when it denied BMF's motion to vacate the default judgment. Therefore, we AFFIRM.

United States District Court
Northern District of Illinois
Eastern Division

Bakery Machinery & Fabrication, Inc.

v.

Traditional Baking, Inc.

JUDGMENT IN A CIVIL CASE

Case Number: 06 C 5150

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that default judgment in the amount of $582,000 is entered on the counterclaim in favor of Traditional Baking, Inc. and against Bakery Machinery & Fabrication, Inc.

Michael W. Dobbins, Clerk of Court

Date: 4/15/2008

/s/ Michael Dooley, Deputy Clerk

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge
Joan H. Lefkow

Sitting Judge if Other than Assigned Judge

CASE NUMBER
06 C 5150

DATE
4/15/2008

CASE TITLE
Bakery Machinery & Fabrication, Inc. vs. Traditional Baking, Inc.

DOCKET ENTRY TEXT
Plaintiff's motion to vacate order striking pleadings, entering default and default award [#70] is denied. Magistrate Judge Valdez's report and recommendation [#64] denying defendant's motions for additional sanctions [#52, #54] has not been objected to and is now adopted by this court; therefore, defendants' motions [#52, #54] are also denied. This case is terminated.

■ [For further details see text below.]

Notices mailed by Judicial staff.
*Mail AO 450 form.

STATEMENT

Plaintiff Bakery Machinery & Fabrication, Inc. ("BMFI") has moved to vacate this court's orders of October 25 and November 20, 2007, which, among other things, struck all of its pleadings in this case and entered default and a default judgment against it on the counterclaim of defendant Traditional Baking, Inc. ("TBI") in the amount of $582,000. These orders were entered after BMFI was warned in the court's order of September 24, 2007 that if its counsel, James Hinterlong, did not comply with certain conditions, all of its pleadings filed by Mr. Hinterlong up to that date would be stricken without leave to refile, and that the court would consider TBI's motion for default at a hearing on October 25, 2007. The September 24 order was based on Mr. Hinterlong's persistent failure to comply with federal and local rules as well as earlier orders of the court, as was described therein. Mr. Hinterlong did not comply with any of the listed conditions within the allotted time and did not appear in court on October 25, 2007. The court therefore followed through on its promise and entered its orders of October 25 and November 20, 2007.

Mr. Hinterlong appeared in court on November 20, 2007 but still had not complied with any portion of the court's September 24, 2007 order. The court ordered him to file his appearance and to pay the ordered $50 sanction to the Clerk of the Court before he could do anything further in the case, which he did after court on that day. On November 29, 2007 Mr. Hinterlong filed an "Objection to Entry of Default and

Motion to Vacate Default," which contains a subset of the arguments he raises in the instant motion to vacate, filed on December 14, 2007. TBI responded, as ordered, on January 4, 2008. BMFI was given until January 11, 2008 to reply but did not do so. On January 30, 2008 BMFI filed a motion to substitute attorneys and to temporarily stay the proceedings, which the court granted. It then filed a motion for leave to file a reply brief, which the court granted over TBI's objection.

In his opening motion, Mr. Hinterlong lists 14 statements. They include a purported justification for not attending court on October 25, 2007, allegations that TBI missed certain deadlines in the case as well, and arguments about the merits of the case. BMFI's new counsel, in their reply brief, argue simply that the default judgment of $582,000 is too harsh in light of the fact that Mr. Hinterlong concealed the true facts from BMFI and misled it to think the case was going well. They point out that once BMFI realized what had happened, which was only on January 23, 2008 when it received a notice from the LaSalle County Recorder's Office that a default judgment had been entered against it, it expeditiously fired Mr. Hinterlong and hired new attorneys.

Both parties recognize that Federal Rule of Civil Procedure 60(b)(1) governs this motion. It provides, in relevant part,

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the

court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect...

In order to vacate a default judgment, the moving party must show (1) good cause for the default, (2) quick action to correct it, and (3) a meritorious defense to the plaintiff's complaint (or, in this case, the defendant's counterclaim), in addition to the requirements of Rule 60(b). *Sun* v. *Bd. of Trs. of Univ. of Ill.*, 473 F.3d 799, 811 (7th Cir. 2007) (citing *Pretzel & Stouffer, Chartered* v. *Imperial Adjusters, Inc.*, 28 F.3d 42, 45 (7th Cir. 1994).[1] "Excusable neglect, [the

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[1]In *Jones* v. *Phipps*, 39 F.3d 158, 162 (7th Cir. 1994) (citations omitted), the court explained,

> While the tests are identical under either Rule 55© [for vacating an entry of default, as opposed to a default judgment] or Rule 60(b), respect for the finality of judgments results in the application of the test under Rule 60(b) circumstances – where a default judgment has been entered – to be much more limited and stringent. This narrowness is achieved by interpreting the three-part standard in light of the language of Rule 60(b)(1) which, by its very terms, establishes a high hurdle for parties seeking to avoid default judgments and requires something more compelling than ordinary lapses of diligence or simple neglect to justify disturbing a default judgment.

Seventh Circuit has] explained, requires a showing that 'the actions leading to the default were not willful, careless, or negligent.'" *Calumet Lumber, Inc.* v. *Mid-America Indus., Inc.*, 103 F.3d 612, 614 (7th Cir. 1997) (citations omitted).

Mr. Hinterlong's motion to vacate offers no explanation for his complete failure to comply with the court's clear order of September 24, 2007, which was itself based on his earlier unexplained actions (including his persistent failure to file an appearance in this case, to register as an electronic filer and otherwise comply with the court's General Order on Case Filing, to obey Magistrate Judge Valdez's Standing Order, and to pay the sanction of $1,375 that this court ordered him to pay on June 25, 2007). His excuse for not attending court on October 25, 2007, even if believed, does not address those other failures. Incredibly, TBI represents that at least as of January 4, 2008, Mr. Hinterlong still had not registered as an electronic filer or paid the sanction ordered by the court on June 25, 2007. Furthermore, Mr. Hinterlong did not file his objections or motion to vacate the default judgment for weeks after the court entered default on October 25, 2007. For these reasons, BMFI cannot show excusable neglect or quick action to correct it. The court is constrained to conclude that Mr. Hinterlong's actions leading to the default judgment, as have been described here and in the court's previous orders, were willful.

Furthermore, "[w]hile it is true that a court is slow to attribute the errors of counsel to its client, [the

Seventh Circuit has also] held that a party who chooses his counsel freely should be bound by his counsel's action. Absolution exists only for 'excusable neglect'; more culpable conduct by the attorney has mortal consequences for the client's case." *Johnson* v. *Gudmundsson*, 35 F.3d 1104, 1117 (7th Cir. 1994) (citations omitted) (affirming an entry of default judgment on a counterclaim); *see also United States* v. *7108 W. Grand Ave.*, 15 F. 3d 632, 635 (7th Cir. 1994) (clients must be held accountable for their attorneys' actions, no matter where they fall on the continuum between "mere negligence" and "gross misconduct."). In *Johnson*, "the default judgment was entered as a sanction for Johnson's failure to appear at a scheduled hearing and failure to participate in the preparation of a pretrial order, failures which occurred hard on the heels of earlier missed deadlines and unexplained absences." *Id.* Both *Johnson* and this case are thereby distinguishable from *A.F. Dormeyer Co.* v. *M.J. Sales & Distrib. Co.*, 461 F.2d 40 (7th Cir. 1972), cited by BMFI, where the defendant's only failure was to neglect to file a copy of its answer with the Clerk of the Court when it had served a copy on the plaintiff's attorneys within the proper time.

For all of these reasons, BMFI's motion to vacate must be denied. Because BMFI's complaint has been stricken without leave to reinstate and judgment has been entered on TBI's counterclaim, this case is terminated.

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois
Eastern Division
CM/ECF LIVE, Ver 3.0

Bakery Machinery & Fabrication, Inc.
Plaintiff,

v.

Case No.: 1:06-cv-05150
Honorable Joan H. Lefkow

Traditional Baking, Inc.
Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Tuesday, November 20, 2007:

MINUTE entry before Judge Joan H. Lefkow :Motion hearing held on 11/20/2007 regarding motion for default judgment[61]. Defendant/counter-plaintiff's motion for default judgment [61] is granted. Judgment is entered in favor of defendant/counter-plaintiff Traditional Baking, Inc. and against plaintiff/counter-defendant Bakery Machinery & Fabrication, Inc. in the amount of $582,000. Plaintiff/counter-defendant's objection to the entry of default and motion to vacate default is stricken without prejudice. Status hearing of 12/18/2007 and bench trial of 1/7/2008 are stricken. Mailed notice(mad,)

ATTENTION: This notice is being sent pursuant to

Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois
Eastern Division
CM/ECF LIVE, Ver 3.0

Bakery Machinery & Fabrication, Inc.
Plaintiff,

v. Case No.: 1:06-cv-05150
Honorable Joan H. Lefkow

Traditional Baking, Inc.
Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, October 25, 2007:

MINUTE entry before Judge Joan H. Lefkow :Motion hearing held, counsel for defendant/counterplaintiff appearing and counsel for plaintiff/counterdefendant not appearing. Defendant/counterplaintiff's motion to strike pleadings, to enter default on counterclaim and for additional sanctions [47] is granted. Defendant/counterplaintiff's petition for reasonable fees and expenses [56] is granted in the amount of $2,787.98. Status hearing held and continued to 12/18/2007 at 09:30 AM. Bench Trial on the damages portion of the amended counterclaim is set for 1/7/2008 at 10:00 AM.Mailed notice(mad,)

ATTENTION: This notice is being sent pursuant to

Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information. For scheduled events, motion practices, recent opinions and other information, visit our web site at *www.ilnd.uscourts.gov*.

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge
Joan H. Lefkow

Sitting Judge if Other than Assigned Judge

CASE NUMBER
06 C 5150

DATE
9/24/2007

CASE TITLE
Bakery Machinery & Fabrication, Inc. vs. Traditional Baking, Inc.

DOCKET ENTRY TEXT
Motion of Traditional Baking, Inc. to strike pleadings, enter default and for additional sanctions [47] is granted in part, denied in part, and continued in part, as indicated in the Statement. Motion hearing date of 9/25/2007 is stricken and continued to 10/25/2007 at 9:30 a.m. regarding motion for entry of default on the counterclaim [47]. Status hearing is set for 10/25/2007 at 9:30 a.m. James Hinterlong shall pay a sanction of $50 to the Clerk of the Court for having failed to timely file his appearance.

[For further details see text below.]
Notices mailed by Judicial staff.

STATEMENT

Defendant-counterplaintiff, Traditional Baking, Inc. (TBI), has moved to strike the pleadings, to enter default and for additional sanctions against the plaintiff-counterdefendant, Bakery Machinery & Fabrication, Inc. (BMFI), on the grounds that BMFI has repeatedly ignored not only the Federal Rules of Civil Procedure and the Local Rules of this court but also the court's orders in this case, causing TBI to incur unnecessary expense in litigating the claims presented by the pleadings.

TBI represents that BMFI's counsel, James Hinterlong, has failed to pay a court-imposed sanction in the amount of $1,375 which was ordered to be paid by August 31, 2007; that BMFI violated the magistrate judge's standing order regarding settlement conferences by (a) failing to submit a written statement of BMFI's settlement position in advance of the scheduled settlement conference and (b) failing to have a party representative present for the conference on August 28, 2007; and that BMFI caused unnecessary expense to TBI by failing to give reasonable notice of the deposition of Eric Briones. TBI also complains that James Hinterlong has failed to file an appearance, is not a member of the trial bar of the Northern District of Illinois "as required by Local Rule 83.12," and has failed to respond to the court's directive to comply with the court's General Order on Electronic Case Filing.

TBI asks the court to strike the pleadings filed

by BMFI, thereby defaulting BMFI on TBI's counterclaim and striking BMFI's amended complaint, to set the matter for hearing to establish damages suffered by TBI, and to award TBI its reasonable expenses associated with the facts underlying this motion and the bringing of the motion. BMFI argues that the requested sanctions "are extreme to say the least."

This motion presents a perplexing situation, as it is not in any party's or the court's interest to interrupt case preparation and add to its cost by focusing on attorney conduct. Nevertheless, as this is the second time TBI has brought problems with BMFI's counsel's conduct to the court's attention, the issues have to be addressed.

Regarding the alleged failures to give reasonable notice of the Briones deposition, TBI asserts that Mr. Hinterlong gave but 7 days notice for a deposition of Ms. Voortman in California. After TBI's counsel made travel plans, Mr. Hinterlong then added the Briones deposition on 4 days notice. This necessitated changing travel arrangements and caused unnecessary additional expense to TBI. Mr. Hinterlong responds only by saying that he has extended professional courtesy to TBI's counsel on different occasions, which he seems to believe offsets his own failure to give reasonable notice of depositions. See Fed. R. Civ. P. 30(b)(1) ("A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action.").

Professional courtesies that do not significantly impose costs on the opposing party are normal and necessary for the preparation of litigation. With one exception, Mr. Hinterlong does not claim that courtesies extended to TBI's counsel ("allowing" TBI to file its responsive pleading and its answers to interrogatories late, rescheduling a noticed deposition for the convenience of the witness) imposed additional costs on BMFI. Although Mr. Hinterlong does not clearly explain that BMFI's witnesses were deposed at Ms. Voortman's place of business, he seems to argue that BMFI bore added expense for witnesses to travel more than 100 miles to Ms. Voortman's place of business. Apparently counsel agreed that the depositions should take place at one location. Without reason to believe that TBI failed to give reasonable notice of a deposition or otherwise imposed unnecessary expense, the court finds no cause to excuse Mr. Hinterlong's failures to give more advance notice of the Briones deposition where travel to California was involved. Nonetheless, the court in the exercise of discretion will not impose on BMFI the added expense associated with the latenoticed deposition that was added to the California trip.

With respect to issues relating to court administration, the court finds that Mr. Hinterlong has unreasonably failed to file an appearance. In BMFI's response to the motion, Mr. Hinterlong does not deny that he has failed to file an appearance nor does he offer any excuse for having failed to do so. The complaint was filed September 22, 2006. The Clerk on September 26 mailed an attorney appearance form to

Mr. Hinterlong, whose name appears on the complaint as counsel for BMFI. Yet, as of the date of this order, the docket reflects no appearance of counsel for BMFI.

Local Rule 83.16(b) provides, as pertinent here, "[A]n appearance form shall be filed by every attorney... who represents a party in any proceeding brought in this Court, whether before a judge or magistrate judge..." The appearance form must be filed "prior to or simultaneously with the filing of any motion, brief or other document in a proceeding before a judge or magistrate judge of this Court, or at the attorney s initial appearance before a judge or magistrate judge of this Court, whichever occurs first." LR 83.16(c). "An attorney who fails to file an appearance form where required to do so by this rule may be sanctioned." LR 83.16(d). *See Strong* v. *Fairman*, 676 F. Supp. 161 (N.D. Ill. 1987) ("Inadvertence is no excuse for violating Rule 3.14 [a previous version of LR 83.16]").

The court further finds that Mr. Hinterlong has unreasonably failed to comply with the court's General Order on Electronic Case Filing. In BMFI's response to the motion, Mr. Hinterlong does not deny that he has failed to comply with the court's General Order on Electronic Case Filing after having been admonished by the court to do so. *See* Docket Entry No. 44, July 26, 2007 ("Plaintiff's counsel is reminded to comply with the Court's General Order on Case Filing, November 16, 2004, as amended. 'Except as expressly provided and in exceptional circumstances preventing a Filing User from filing electronically, all petitions, motions,

memoranda of law, or other pleadings and documents required to be filed with the court after September 30, 2005 in connection with a case assigned to ECF shall be electronically filed.'"). Neither does he give any explanation or excuse for having failed to do so.

The court's general orders posted on its website reflect, "ECF/PACER is now [the] sole source for electronic document retreival [*sic*] for the Northern District of Illinois." Any attorney practicing in this court should by now be registered as an electronic filer, as the Clerk is not obligated to send notices or orders via United States mail. Failure of an attorney to register as an electronic filer creates administrative problems for the court and jeopardizes the client's interests because counsel cannot be assured of receiving notice of docket entries. This could result in serious consequences such as default or forfeiture of a right or opportunity.[1]

Turning now to the allegations of disobedience to orders of court in this case, the court finds that Mr. Hinterlong does not deny, and therefore tacitly admits,

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[1]Had he filed an appearance, however, Mr. Hinterlong would not, by not having been admitted to the trial bar, be appearing in violation of the court's local rules, so long as he did not appear alone in testimonial proceedings. See LR 83.12(a)("...Attorneys admitted to the general bar, but not to the trial bar,... may appear alone except as otherwise provided by this rule"), and (b) "...An attorney who is a member of the bar, but not of the trial bar, may appear during testimonial proceedings only if accompanied by a member of the trial bar who is serving as advisor...").

disobedience. The court finds that he has not paid a court-ordered sanction of $1,375 and that he disobeyed Judge Valdez's Standing Order regarding settlement conferences [See Docket Entry Nos. 36, 41].

The court, therefore, orders that the motion is granted in part, denied in part, and continued in part, as follows:

A. All of the pleadings, motions, and other documents that James Hinterlong has filed in this case will be stricken without leave to refile if BMFI does not comply with the following orders by Wednesday, October 24, 2007:

1. BMFI's counsel shall file an appearance forthwith;

2. James Hinterlong shall pay a sanction of $50 to the Clerk of the Court for having failed to timely file his appearance;

3. James Hinterlong shall pay the sanction ordered on June 25, 2007; and

4. James Hinterlong shall demonstrate that he has registered as an electronic filer or show cause why exceptional circumstances prevent him from doing so;

B. The request for an award of sanctions for failure to comply with Judge Valdez's settlement order is referred to the magistrate judge to hold a

hearing as to whether a sanction should be imposed against BMFI and/or James Hinterlong for failure to comply with her standing order, and, if so, the nature of the sanction, and for a report and recommendation as to the amount of any monetary sanction that should be imposed;

C. TBI is allowed reasonable expenses for bringing this motion and shall have until October 15, 2007 to file and serve a declaration of fees. BMFI shall have until October 25, 2007 to file a response objecting to the amount of the requested award;

D. TBI's motion for sanctions related to the deposition of Briones is denied;

E. TBI's motion for entry of default on the counterclaim is continued to October 25, 2007, at 9:30; and

F. This case will be called for a status hearing on Thursday October 25, 2007 at 9:30.

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois
Eastern Division
CM/ECF LIVE, Ver 3.0

Bakery Machinery & Fabrication, Inc.
Plaintiff,

v.

Case No.: 1:06-cv-05150
Honorable Joan H. Lefkow

Traditional Baking, Inc.
Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, July 26, 2007:

MINUTE entry before Judge Joan H. Lefkow :Plaintiff's motion to enlarge [42] is granted. The non-expert discovery cut-off date is extended to 8/24/2007. Plaintiff's counsel is reminded to comply with the Court's General Order on Case Filing, November 16, 2004, as amended. "Except as expressly provided and in exceptional circumstances preventing a Filing User from filing electronically, all petitions, motions, memoranda of law, or other pleadings and documents required to be filed with the court after September 30, 2005 in connection with a case assigned to ECF shall be electronically filed." Mailed notice(mad,)

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United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge
Joan H. Lefkow

Sitting Judge if Other than Assigned Judge

CASE NUMBER
06 C 5150

DATE
6/25/2007

CASE TITLE
Bakery Machinery & Fabrication, Inc. vs. Traditional Baking, Inc.

DOCKET ENTRY TEXT
Defendant's petition for reasonable fees and expenses [31] is granted in the amount of $1,375.00. Plaintiff is given until August 31, 2007 to pay the award to defendant. *See Statement below*

■ [For further details see text below.]
Notices mailed by Judicial staff.

STATEMENT

On December 4, 2006, the court entered an agreed scheduling order closing fact witness discovery on May 31, 2007 and directing the parties to make

their Rule 26(a)(1) disclosures by January 10, 2007. Defendant ("TBI") complied with the disclosure aspect of the order on January 10, 2007. Plaintiff ("BMF") did not comply, despite several requests initiated by TBI's counsel, including several phone conversations and two letters, one dated March 15 and the second March 26. During a status hearing on March 27, TBI noted BMF's non-compliance and the court again directed BMF to make the disclosures, by April 2, a date BMF's counsel stated that he could make the required disclosures. Still BMF did not comply.

On April 4, TBI filed a motion to compel and for sanctions, with a certification that the parties had conferred in good faith in an effort to resolve the matter. This motion was noticed for hearing on April 17. As of the April 17 hearing, BMF had not yet served its Rule 26(a)(1) disclosures. The court granted the motion to compel and continued the motion for sanctions to May 29. On May 29, the parties appeared before the court and reported that BMF had complied with the disclosure order (on a date not disclosed in the moving or responding papers). TBI now requests that the sanctions provided by Rule 37(a)(4), Fed. R. Civ. P., be granted.

BMF explains its non-response and non-compliance with court orders by asserting broadly that the discovery required gathering of more than 1,000 pages from disparate sources, that some of the information was "similar to that of TBI," that some of the disclosures were of limited use in a settlement conference with the magistrate judge, and "any laxity

on the part of BMF was not intended to, nor did it unduly hobble any efforts by TBI, to proceed with its case, as it had most of the relevant documents in its possession." BMF also contends that an award of $2,193.17, an amount approximately 1% of the relief requested in the lawsuit, is unreasonable.

Rule 37(a)(4) provides that where a motion to compel is granted,

> the court shall, after affording an opportunity to be heard, require the party . . . whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, . . . was substantially justified, or that other circumstances make an award of expenses unjust.

Under the discovery rules, the burden is on the responding party to avoid imposition of avoidable costs. "Allocation of the burden in this way... is particularly appropriate when a court order is disobeyed." Notes of the Advisory Committee, Rule 37, 1970 Amendment, subdiv. (b).

BMF, by its counsel, has had an opportunity to

be heard. TBI has demonstrated a good faith effort to obtain compliance made before filing the motion to compel. BMF has not demonstrated that its non-disclosure and its disobedience of the court were substantially justified. BMF had notice on December 4, 2006, that the disclosures were required. It never moved the court for an extension of time and never indicated any difficulty in obtaining the necessary materials to make the required disclosures. Further, BMF's counsel plainly failed to honor commitments he made to opposing counsel and to this court. Clearly, the three-month delay in making the disclosures disrupted the orderly preparation of the case set out in the scheduling order. BMF brought this law suit. It has the responsibility to pursue it diligently and without imposing unnecessary costs on TBI.

The court allows TBI its attorney's fees in the total amount of 5.0 hours (drafting correspondence to BMF's counsel, 0.7 hours; legal research, 1.0 hour; preparing the motion to compel, 2.0 hours; preparing for the court hearing, 0.3 hours, and appearing in court (1.0 hour). The court accepts as reasonable a billing rate of $275 per hour. Therefore, an award of sanctions is imposed against BMF in the amount of $1,375.00.

BMF's counsel is directed to serve copy of this order on his client's agent principally responsible for this litigation. The court expects that, unless the default is fairly attributable to the client, such as its failure to cooperate in producing responsive documents, the cost of this award will not be imposed on the client but rather will be borne by counsel.

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois
Eastern Division
CM/ECF LIVE, Ver 3.0

Bakery Machinery & Fabrication, Inc.
Plaintiff,

v. Case No.: 1:06-cv-05150
Honorable Joan H. Lefkow

Traditional Baking, Inc.
Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Tuesday, April 17, 2007:

MINUTE entry before Judge Joan H. Lefkow :Motion hearing held. Defendant's motion for default [26] denied without prejudice. Defendant's motion to compel [24] granted. The request contained in the motion to compel to award sanctions is continued to 5/29/2007 at 9:30 a.m. Joint oral motion to extend discovery deadline is granted to 6/29/2007. Parties are to submit a proposed agreed revised scheduling order to chambers. Status hearing of 4/24/2007 stricken and reset to 5/29/2007 at 09:30 AM.Mailed notice(mad,)

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SUP. CT. U.S.
FILED

No. 09-385

IN THE
Supreme Court of the United States

BAKERY MACHINERY & FABRICATION, INC.,

Petitioner,

v.

TRADITIONAL BAKING, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented a compelling reason to grant the Petition, in light of Petitioner's failure to preserve the issue that its attorney's conduct served as a basis for relief under Fed. R. Civ. P. 60(b)(6), where Petitioner's motion to vacate the default judgment focused solely upon whether the conduct precipitating Petitioner's default constituted "excusable neglect" under Fed. R. Civ. P. 60(b)(1), Petitioner never requested the District Court to consider whether such conduct constituted the type of "extraordinary circumstances" which justify relief under Rule 60(b)(6), and the District Court's detailed ruling was therefore limited to the fact that this case did not present an instance of "excusable neglect" under Rule 60(b)(1).

II. Whether Petitioner has presented a compelling reason to grant the Petition, where the Seventh Circuit's Opinion affirming the District Court's denial of the Motion to Vacate Default Judgment is consistent with the prior decisions of this Court regarding Fed. R. Civ. P. 60(b)(6) and the extent to which a client is responsible for the conduct of its attorney, and where Petitioner does not claim that the District Court abused its discretion or that the Seventh Circuit's ruling conflicts with any decision of this Court or another Circuit Court of Appeals, or that the Seventh Circuit so far departed from the usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Traditional Baking, Inc. is a California corporation. There is no parent corporation. No publicly held company owns 10% or more of Traditional Baking, Inc.'s stock.

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STATEMENT OF THE CASE

The Petition for Writ of *Certiorari* omits several pertinent facts that are crucial to a full understanding of what occurred, and what did not occur, before the District Court in this case. Accordingly, Respondent submits this complete Statement of the Case for the Court's review and consideration.

This matter arises from Bakery Machinery & Fabrication, Inc.'s failure to perform its contractual obligations to manufacture and deliver to Traditional Baking Inc. a new oven within six months from the date the oven was ordered (R. Doc. 20, pp. 1-2). Bakery Machinery & Fabrication, alleging that Traditional Baking failed to live up to its duties under the contract, filed suit first in the Circuit Court for LaSalle County, Illinois (R. Doc. 1, p. 1).

Traditional Baking properly removed the action to the United States District Court for the Northern District of Illinois (R. Doc. 1, p. 1). After Traditional Baking filed its Answer and Counterclaim–premised upon Bakery Machinery & Fabrication's failure to deliver the oven in six months–the District Court promptly entered a scheduling order that required the parties to make disclosures required under Fed. R. Civ. P. 26(a)(1) by January 10, 2007 and set a fact discovery cut-off of May 31, 2007 (R. Doc. 13, p. 1). The District Court further ordered any amended pleadings to be filed on or before February 28, 2007, and that responsive pleadings thereto be filed by March 14, 2007 (R. Doc. 19). Although Bakery Machinery & Fabrication served an Amended Complaint upon Traditional Baking, which

Traditional Baking answered on March 2, 2007 (R. Doc. 21), the Amended Complaint was never actually filed by Bakery Machinery & Fabrication.

On February 28, 2007, Traditional Baking filed an Amended Counterclaim (R. Doc. 20). On March 14, 2007, Bakery Machinery & Fabrication served an Answer to Traditional Baking's original Counterclaim, which had been superseded by the Amended Counterclaim filed on February 28 (R. Doc. 26, p. 2).

On March 15, 2007, counsel for Traditional Baking called counsel for Bakery Machinery & Fabrication to inform him that the Answer to the original Counterclaim was insufficient, at which time counsel for Bakery Machinery & Fabrication claimed not to have seen the Amended Counterclaim (R. Doc. 26, pp. 3, 45). Although a copy of the Amended Counterclaim had been emailed to Bakery Machinery & Fabrication's counsel on March 2, 2007, counsel for Traditional Baking forwarded another copy of the Amended Counterclaim via correspondence also dated March 15, 2007 (*Id.*). Bakery Machinery & Fabrication's counsel promised to try to file a responsive pleading to the Amended Counterclaim on or before the next court date scheduled for March 27, 2007 (R. Doc. 26, p. 45).

By March 27, 2007, Bakery Machinery & Fabrication still had not filed an answer to the Amended Counterclaim, and the District Court issued another Order directing Bakery Machinery & Fabrication to respond to the Amended Counterclaim by April 2, 2007 (R. Doc. 26, p. 48). Bakery Machinery & Fabrication again failed to respond by the date set by the District

Court. Accordingly, on April 4, 2007, Traditional Baking moved to default Bakery Machinery & Fabrication for its failure to respond to the Amended Counterclaim as ordered by the District Court (R. Doc. 26). Contemporaneously, Traditional Baking also moved, pursuant to Fed. R. Civ. P. 37(b)(2), to compel Bakery Machinery & Fabrication to serve its Rule 26(a)(1) disclosures, which were due on January 10, 2007, and requested sanctions (R. Doc. 24).

On April 17, 2007, the District Court granted Traditional Baking 's motion to compel, and continued that portion of the motion seeking sanctions against Bakery Machinery & Fabrication for the latter's repeated failure to comply with the Federal Rules of Civil Procedure and the prior orders concerning discovery and filing of pleadings (R. Doc. 28). The District Court also denied, *without prejudice*, Traditional Baking's Motion for Default, as Bakery Machinery & Fabrication filed its Answer to the Amended Counterclaim on April 17th (R. Doc. 28, 29).

Ultimately, on June 25, 2007, the Court granted Traditional Baking 's motion for sanctions and ordered Bakery Machinery & Fabrication to pay Traditional Baking sanctions in the amount of $1375 by August 31, 2007 (R. Doc. 37). Thereafter, on July 30, 2007, Traditional Baking served upon Bakery Machinery & Fabrication a 73-paragraph request for admission of facts and the genuineness of documents pursuant to Fed. R. Civ. P. 36 (R. Doc. 45). Bakery Machinery & Fabrication never served a response to those requests for admission (R. Doc. 86, pp. 8-9).

On September 6, 2007, Traditional Baking filed its Motion to Strike Pleadings, Enter Default, and for Additional Sanctions against Bakery Machinery & Fabrication (R. Doc. 47). The motion was again filed pursuant to Fed. R. Civ. P. 37(b)(2), and based upon Bakery Machinery & Fabrication's repeated refusal to abide by the Federal Rules of Civil Procedure, the Local Rules of the Northern District of Illinois, and numerous orders of the District Court, including the payment of sanctions ordered on June 25, 2007 (R. Doc. 47, p.2). Traditional Baking also renewed its previously filed Motion for Default, and requested additional sanctions based upon Bakery Machinery & Fabrication's conduct, including its failure to send a party representative to a settlement conference before the magistrate judge (*Id.*, pp. 2-3).

Following a hearing and the filing of Bakery Machinery & Fabrication's written response to Traditional Baking's Motion to Strike Pleadings, the District Court entered an order on September 24, 2007 directing Bakery Machinery & Fabrication and its attorney to take several affirmative steps before October 25, 2007, lest all of its pleadings be stricken without leave to refile (R. Doc. 50, p. 3). Specifically, the Court ordered: (1) Bakery Machinery & Fabrication's attorney to file an appearance; (2) Bakery Machinery & Fabrication's attorney to pay a sanction of $50 to the Clerk of the Court for having failed to file an appearance; (3) Bakery Machinery & Fabrication to pay the sanction ordered on June 25, 2007; and (4) Bakery Machinery & Fabrication's attorney to demonstrate that he had registered as an electronic filer or show cause why he was prevented from doing so (*Id.*). The Court then

continued Traditional Baking's Motion for Entry of Default until October 25, 2007 (*Id.*).

Despite the District Court's repeated warnings, counsel for Bakery Machinery & Fabrication failed to appear at the hearing on October 25, 2007 (R. Doc. 59). Further, Bakery Machinery & Fabrication had not complied with any aspect of the Court's order of September 24, 2007 (R. Doc. 89, p. 1). Accordingly, the District Court entered an order striking all of Bakery Machinery & Fabrication's pleadings without leave to refile and granting Traditional Baking's motion for default in its favor on its Amended Counterclaim (R. Doc. 59). The District Court also set the case for a bench trial on the only remaining issue, namely, Traditional Baking's claim for damages under its Amended Counterclaim (*Id*.).

On November 7, 2007, Traditional Baking moved for entry of default judgment against Bakery Machinery & Fabrication based on the verification of its damages as set forth in the affidavits of Traditional Baking's president and its previously-disclosed expert witness (R. Doc. 61, pp. 11, 74). On November 20, 2007, the District Court granted the motion and entered judgment in favor of Traditional Baking in the amount of $582,000 (R. Doc. 65). Also on November 20, 2007, counsel for Bakery Machinery & Fabrication appeared and sought to be heard on the Motion for Default Judgment (*Id.*). After ascertaining that counsel *still* had not complied with any portion of the September 24, 2007 order, the District Court ordered Bakery Machinery & Fabrication's counsel to file his appearance with and pay the fine to the clerk of court as previously ordered

(R. Doc. 66). Counsel for Bakery Machinery & Fabrication also filed on that date an objection and motion to vacate the order of October 25, 2007 (R. Doc. 67); however, because Bakery Machinery & Fabrication failed to provide notice to Traditional Baking of its motion, the Court struck the objection/motion to vacate without prejudice (R. Doc. 65).

On December 14, 2007, Bakery Machinery & Fabrication filed a "Motion to Vacate Order Striking Pleadings, Entering Default and Default Award" (R. Doc. 70). In that motion, Bakery Machinery & Fabrication cited *no* statutory or case authority in support of its argument that the November 20, 2007 order should be vacated (R. Doc. 70). On December 18, 2007, the District Court entered an order directing Traditional Baking to file its response to this motion on or before January 4, 2008 and Bakery Machinery & Fabrication to file its reply on or before January 11, 2008. Traditional Baking complied with the Court's order and filed a timely response on January 4, 2008. (R. Doc. 73). In that response, Traditional Baking pointed out that Fed. R. Civ. P. 60(b) governed the vacation of judgments (R. Doc. 73, p. 5). Bakery Machinery & Fabrication failed to reply before the Court's January 11, 2008 deadline.

On January 30, 2008, Bakery Machinery & Fabrication filed a Motion to Substitute Counsel and Temporarily Stay All Proceedings (R. Doc. 76). The motion was supported by an affidavit from the President of Bakery Machinery & Fabrication, in which he claimed that every time he asked his counsel about the litigation over the previous nine months, he was informed that the litigation was going well (R. Doc. 76-4, p.2). Bakery

Machinery & Fabrication's President also stated that he first learned of the default judgment on January 23, 2008 (*Id.*). The District Court granted the motion and stayed the matter until February 19, 2008 (R. Doc. 78).

On February 19, 2008, Bakery Machinery & Fabrication filed a "Motion for Leave to File Reply *Instanter*," wherein Bakery Machinery & Fabrication sought leave to file a reply brief in support of its motion to vacate raising new arguments relating to the conduct of Bakery Machinery & Fabrication's prior counsel as a basis for the District Court to grant the motion (R. Doc. 82, 86). In its proposed reply brief, Bakery Machinery & Fabrication once again offered the affidavit from its President, which was filed in connection with the motion to substitute, as support for the motion to vacate (R. Doc. 86-3). Bakery Machinery & Fabrication requested not only that the default judgment be vacated, but that it be permitted to file untimely responses to Traditional Baking's outstanding requests to admit facts (R. Doc. 86, pp. 8-9). Traditional Baking objected to the motion for leave to file, since the proposed reply brief was untimely and improperly argued new facts that did not appear in the original motion to vacate (R. Doc. 84). The District Court granted Bakery Machinery & Fabrication leave to file its reply brief, but indicated that it would "disregard facts and argument not appropriate for a reply memorandum" (R. Doc. 85).

The District Court denied Bakery Machinery & Fabrication's motion to vacate on April 15, 2008, finding that the conduct of Bakery Machinery & Fabrication's counsel which led to the entry of the default judgment

was willful and properly attributable to Plaintiff (R. Doc. 89, p.2). In its decision, the District Court noted that "[b]oth parties recognize that Federal Rule of Civil Procedure 60(b)(1) governs this motion," and made no mention of Rule 60(b)(6) (*Id.*).

Despite the fact that the District Court never considered whether relief may have been appropriate pursuant to Rule 60(b)(6), Bakery Machinery & Fabrication and its new counsel did not file a motion pursuant to Fed. R. Civ. P. 59(e) to challenge the District Court's Rule 60(b) ruling. Instead, Bakery Machinery & Fabrication appealed the District Court's April 15, 2008 ruling to the United States Court of Appeals for the Seventh Circuit (R. Doc. 90). Before the Seventh Circuit, Bakery Machinery & Fabrication conceded that the District Court did not abuse its discretion when it determined that relief under Rule 60(b)(1) was not available. (Brief of Appellant at 12). Nevertheless, Bakery Machinery & Fabrication argued, for the first time on appeal, that it was entitled to relief under Rule 60(b)(6), based upon the allegations of its President that Bakery Machinery & Fabrication had been diligent in its conduct of the litigation and had been deceived by its prior counsel (*Id.*).

In its Opinion, the Seventh Circuit acknowledged Bakery Machinery & Fabrication's *argument* that it had been a diligent litigant deceived by its counsel, but made no such findings (Pet. App., A-7-8). The Seventh Circuit determined, however, that notwithstanding Bakery Machinery & Fabrication's "purported diligence," the conduct of its attorney did not rise to the level of extraordinary circumstances which justified relief under

Rule 60(b)(6). (*Id.*, A-8). The Seventh Circuit determined that the District Court did not abuse its discretion in denying Petitioner's motion to vacate, and affirmed the District Court's April 15, 2008 Order. (*Id.*, A-9).

SUMMARY OF ARGUMENT

Petitioner has presented no "compelling reasons" for its Petition for a Writ of *Certiorari* to be granted. Sup. Ct. R. 10. As an initial matter, Petitioner does not even assert that the District Court abused its discretion when it failed to grant the motion to vacate the default judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. Indeed, Petitioner cannot assert that such an abuse of discretion occurred, because Bakery Machinery & Fabrication never asked the District Court to consider whether relief from the judgment was appropriate pursuant to Rule 60(b)(6). Furthermore, even if the Petitioner could identify an erroneous factual finding or the misapplication of a properly stated rule of law, such reasons would not suffice to support the granting of the Petition. Sup. Ct. R. 10. Most importantly, however, the Seventh Circuit's Opinion affirming the District Court is consistent with, and indeed relied upon, the well-established precedent of this Court that a client is bound by the acts or omissions of its freely selected lawyer-agent.

Despite its exaggerated assertion that the Seventh Circuit's Opinion will punish litigants "before every appellate circuit and every District Court," Petitioner nowhere contends that the Seventh Circuit's Opinion conflicts with any decision of this Court or of another United States Circuit Court of Appeals on the same

important matter, or that the Seventh Circuit so far departed from the usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power. Petitioner has simply failed to satisfy its burden of demonstrating any compelling reason for the Petition to be granted.

ARGUMENT

I.

THE DISTRICT COURT'S DENIAL OF THE MOTION TO VACATE IS REVIEWED FOR AN ABUSE OF DISCRETION.

A motion for relief from judgment under Rule 60(b) is entrusted to the considerable discretion of the District Court. *Browder v. Dir., Dept. of Corrections*, 434 U.S. 257, 263 (1978). Accordingly, a District Court's 60(b) ruling is subject to only limited and deferential appellate review: whether the ruling constituted an abuse of that discretion. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). Such an abuse of discretion occurs "only when *no* reasonable person could agree with the district court; there is no abuse of discretion if a reasonable person could disagree as to the propriety of the court's action." (Pet. App. A-6, quoting *Williams v. Hatcher*, 890 F.2d 993, 995 (7th Cir. 1989)). As noted by the Seventh Circuit, a district court ruling upon a Rule 60(b) motion enjoys "discretion piled upon discretion." (Pet. App. A-7, quoting *Swaim v. Molton Co.*, 73 F.3d 711, 722 (7th Cir. 1996)). Given this deferential standard of review, even if this Court might have ruled upon Petitioner's Rule 60(b) motion differently, it does not follow that the

District Court abused its discretion here. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976)(affirming dismissal with prejudice entered as a sanction under Fed. R. Civ. P. 37).

Further, Petitioner is charged with establishing a compelling reason to grant the Petition. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Petitioner's attempt to meet its burden reduces to its bare assertion that "[j]ustice has not yet been done in this case." (Pet. at 18). In point of fact, justice *was* done in this case. As noted by this Court in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 n.10 (1962), to resurrect litigation against the defendant so as not to penalize the plaintiff for the errors and omissions of its counsel would be to unjustly visit the sins of the plaintiff's attorney upon the defendant.

Further, as this Court has previously stated, the writ of *certiorari* should not be granted except in cases involving principles of public importance and where there is a real conflict of opinion and authority between the various circuit courts of appeal. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955), quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Petitioner fails to cite any compelling reason why this Court should grant the Petition. Rather, this case is one of many unremarkable decisions in which the District Court exercised its substantial discretion to deny a Rule 60(b) motion predicated upon inexcusable neglect. Accordingly, the Petition should be denied.

II.

PETITIONER HAS NOT PRESENTED A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI, WHERE PETITIONER NEVER ASKED THE DISTRICT COURT TO CONSIDER WHETHER RELIEF UNDER RULE 60(b)(6) WAS APPROPRIATE IN THIS CASE, AND THEREFORE FORFEITED THE ISSUE.

In its Petition, Bakery Machinery & Fabrication contends that the Seventh Circuit "effectively read [Rule 60(b)(6)] out of existence" when it determined that the District Court did not abuse its discretion by denying Petitioner's Rule 60(b) motion. Hyperbole aside, Petitioner elides the fact *that it never requested the District Court to grant relief under Rule 60(b)(6).* Petitioner failed to raise its Rule 60(b)(6) argument in either its "Motion to Vacate Order Striking Pleadings, Entering Default and Default Award," filed by its original attorney Mr. Hinterlong, or in its untimely reply brief in support of that motion filed by its present counsel. Further, even after the District Court denied the motion to vacate solely upon the basis of Rule 60(b)(1), Petitioner and its present counsel never sought to present any Rule 60(b)(6) argument to the District Court by means of a motion to alter or amend judgment pursuant to Rule 59(e). Accordingly, Bakery Machinery & Fabrication forfeited its Rule 60(b)(6) argument by failing to raise it before the District Court. *Swaim v. Moltan Co.*, 73 F.3d 711, 716 (7th Cir. 1996)(on appeal from default judgment and denial of 60(b) motion to vacate same, defendant forfeited opportunity to contest district

court's jurisdiction by failing to raise argument in its 60(b) motion). In light of this forfeiture–by its present counsel–Petitioner has not presented a compelling reason for this Court to grant the writ of *certiorari*.

In general, a federal appellate court does not consider an issue that was not ruled upon in the District Court. *Exxon Shipping Co. v. Baker*, 554 U.S. ___, 128 S. Ct. 2605, 2618 (2008), quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Although the matter is left primarily to the discretion of the various courts of appeals, this Court has noted the danger that injustice may just as often be caused rather than avoided by deciding certain issues without affording the opposing party a chance to respond or the district court an opportunity to otherwise focus the issues. *Singleton*, 428 U.S. at 121. In the present case, the Seventh Circuit should not even have considered Petitioner's Rule 60(b)(6) argument, since the District Court never determined whether "extraordinary circumstances" existed to justify relief under 60(b)(6) and was never asked to do so.

In its opening "Motion to Vacate Order Striking Pleadings, Entering Default and Default Award," Petitioner cited *no* statutory or case authority in support of its argument that the November 20, 2007 order should be vacated (R. Doc. 70). Actually, Traditional Baking, in its response to that motion, pointed out that Rule 60(b) governed the vacation of judgments (R. Doc. 73, p. 5). Thereafter, when Petitioner's current counsel appeared and filed its reply brief, Petitioner blithely cited to Rule 60(b) in its entirety, along with a single case, *A.F. Dorfmeyer, Co. v. M.J. Sales & Distributing Co.*, 461 F.2d 40, 43 (7th Cir.

1972), a case which dealt solely with Rule 60(b)(1). (R. Doc. 86, p.6).

In its reply brief, Petitioner argued before the District Court that it was entitled to relief under Rule 60(b)(1) because its chosen counsel, Mr. Hinterlong, engaged in willful misconduct by repeatedly violating the Federal Rules of Civil Procedure, the Local Rules of the Northern District of Illinois, and numerous orders of the district court, all the while lulling Bakery Machinery & Fabrication into a false sense of security that the litigation was going smoothly. Petitioner further argued that this sanction was too harsh, and that it should not suffer for the conduct of its attorney. Unsurprisingly, in its ruling the District Court noted only that Rule 60(b)(1) governed the motion (Pet. App., A-13). Further, the District Court flatly rejected Petitioner's argument, pointing out that "a party who chooses his counsel freely must be bound by his counsel's action" and that "more culpable conduct by the attorney has mortal consequences for the client's case." (Pet. App., A-16, quoting *Johnson v. Gudmundsson*, 35 F.3d 1104 (7th Cir. 1994)).

Once the District Court denied the motion to vacate on April 15, 2008, Petitioner (and its new counsel) had ten days to file a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e). By that motion, Petitioner arguably could have raised its Rule 60(b)(6) argument and asked the District Court to exercise its discretion and consider whether Petitioner's purported diligence and the alleged wilful misconduct of its attorney constituted exceptional circumstances justifying the extraordinary relief available under Rule

60(b)(6). *Inryco, Inc. v. Metropolitan Engineering Co., Inc.*, 708 F.2d 1225, 1233 (7th Cir. 1983)(holding that a subsequent Rule 59(e) motion preserved a Rule 60(b)(6) argument, despite the fact that Rule 60(b)(6) was never cited or argued in the original motion).[1] Petitioner made a calculated, deliberate decision not to file such a motion, however, and instead appealed to the Seventh Circuit. By failing to raise its Rule 60(b)(6) claims in either its motion to vacate or a subsequent Rule 59(e) motion to alter or amend judgment, Petitioner forfeited its claims to relief under Rule 60(b)(6). See *KPS & Assoc., Inc. v. Designs by FMC, Inc.*, 318 F.3d 1, 16-17 (1st Cir. 2003) (rejecting argument that attorney's gross negligence should not be imputed to client, but especially where plaintiff first raised theory that Rule 60(b)(6) relief was appropriate on appeal).

Before the Seventh Circuit, Petitioner itself conceded that the District Court's ruling was correct under Rule 60(b)(1), because Mr. Hinterlong's conduct was "indefensible." Brief of Appellant at 12. Nevertheless, Petitioner urged the Seventh Circuit to find that the District Court abused its discretion when it denied the motion to vacate since it failed to consider

1. In *Inryco*, the defendant only argued it was entitled to relief under Rule 60(b)(1), although it cited Rule 60(b)(6) in its memorandum in support of its motion to vacate. Here, by contrast, Petitioner merely cited to Rule 60(b) generally, and cited caselaw considering Rule 60(b)(1) only, and these arguments were not raised until Petitioner's untimely reply brief (R. Doc. 86, pp. 5-6). Further, the District Court stated that it would not consider facts or arguments raised for the first time in the reply (R. Doc. 85). As such, even under *Inryco*, Petitioner may have forfeited its right to raise new claims in a Rule 59(e) motion.

whether relief was appropriate under Rule 60(b)(6). *Id.* Of course, the District Court could not have abused its discretion in denying Rule 60(b)(6) relief, because Petitioner never asked it to exercise any discretion under that subsection. *Swaim v. Moltan Co.*, 73 F.3d 711, 717 (7th Cir. 1996)(on appeal from default judgment and denial of 60(b) motion to vacate same, defendant forfeited opportunity to contest district court's jurisdiction by failing to raise argument in its 60(b) motion). Moreover, the District Court had an additional reason not to consider Rule 60(b)(6) when Petitioner only argued that Rule 60(b)(1) relief was appropriate: several decisions of this Court have suggested that relief under subsection (6) is mutually exclusive from that offered under subsection (1) of Rule 60(b). *Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 393 (1993), citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 857, 863 and n.11 (1988).

Petitioner now requests this Court to grant *certiorari* and reverse the Seventh Circuit's Opinion, which held that the District Court did not abuse its discretion in denying Petitioner's motion to vacate. Yet, tellingly, Petitioner fails to argue that the District Court abused its discretion. Presumably, Petitioner's reticence in this regard stems from its knowledge that it never requested the District Court to exercise that discretion and consider whether relief from the default judgment was appropriate under Rule 60(b)(6). In addition, Petitioner previously conceded that the District Court was correct in determining that Rule 60(b)(1) did not apply. Petitioner cannot present any compelling reason for this Court to grant *certiorari*, where Petitioner

cannot even bring itself to argue that the District Court abused its considerable discretion. Accordingly, Bakery Machinery & Fabrication's Petition for Writ of *Certiorari* should be denied for this reason alone.

III.

PETITIONER HAS NOT PRESENTED A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI, WHERE THE SEVENTH CIRCUIT'S OPINION IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS HOLDING THAT CLIENTS MUST BE HELD ACCOUNTABLE FOR THE ACTS AND OMISSIONS OF THEIR ATTORNEYS.

In its Opinion affirming the District Court's denial of Petitioner's Rule 60(b) motion, the Seventh Circuit adhered to its established precedent that an attorney's conduct or misconduct is imputed to his or her client "in *any* context." *United States v. DiMucci*, 879 F.2d 1488, 1496 (7th Cir. 1989)(emphasis in original). In reaching this result, the Seventh Circuit relied upon this Court's well established precedent that a client may not avoid the consequences of the acts or omissions of its attorney. *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962). Further, in the almost fifty years since *Link* was decided, this Court has reaffirmed this principle on several occasions. *United States v. Boyle*, 469 U.S. 241, 250 (1985); *Pioneer Investment Services Co.*, 507 U.S. at 396-397. Moreover, Petitioner makes no claim that a circuit split exists or that the Seventh Circuit so far departed from the usual course of judicial proceedings so as to call for an exercise of this Court's supervisory

power. Accordingly, Petitioner has failed to present a compelling reason for this Court to grant *certiorari* in this case.

Following counsel for Petitioner's repeated failures to litigate this matter in a manner consistent with the Federal Rules of Civil Procedure and the prior orders of the District Court, Traditional Baking brought a motion to strike Petitioner's pleadings and for default judgment pursuant to Fed. R. Civ. P. 37(b)(2). The District Court ultimately granted Traditional Baking's motion, but only after it afforded Petitioner and its prior counsel ample opportunity to avoid such a drastic result. The propriety of this Order has never been questioned, and is entirely consistent with the established precedent of this Court. *National Hockey League*, 427 U.S. at 642. Traditional Baking then obtained a default judgment, which Petitioner subsequently moved to vacate pursuant to Rule 60(b). Petitioner did not appeal the underlying default judgment, although it did appeal the District Court's denial of its Rule 60(b) motion. However, an appeal from a denial of Rule 60(b) relief does not bring up for review the underlying judgment, and is limited to the question of whether the District Court abused its discretion in denying the motion. *Browder*, 434 U.S. at 263 n.7.

In its decisions considering motions for relief under Rule 60(b)(6), this Court has endorsed a strict interpretation of the Rule and required movants to show "extraordinary circumstances" in order to justify reopening a final judgment. *Gonzalez*, 545 U.S. at 535. This Court's first decision to consider Rule 60(b)(6) was in *Klapprott v. United States*, 335 U.S. 601 (1948). In

that case, the petitioner sought relief under Rule 60(b)(6) from a default judgment stripping him of his citizenship, where his default was precipitated by the fact that he had been imprisoned by the United States, weakened from illness and fighting grave criminal charges, where he was unrepresented by counsel in the denaturalization proceedings and lacked the funds to hire one. 335 U.S. at 611. This Court determined that, in light of the aforementioned circumstances and the "extraordinarily severe penalty" of the loss of American citizenship, the facts of the case justified relief under the Rule. 335 U.S. at 612, 614. However, just two years later, *Klapprott* was distinguished by this Court as "a case of extraordinary circumstances" when this Court affirmed the denial of Rule 60(b)(6) relief, where the petitioners (who similarly sought to vacate judgments canceling their certificates of citizenship) among other things, were not ill, imprisoned or penniless, and they had the benefit of counsel of their choosing. *Ackerman v. United States*, 340 U.S. 193, 199-200 (1950). The "extraordinary circumstances" standard has been employed by this Court whenever it considers Rule 60(b)(6). *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 857, 863 and n.11 (1988)("extraordinary circumstances" found justifying relief where the district judge inexcusably failed to recuse himself pursuant to 28 U.S.C. §455(a)); *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)(a change in the law regarding tolling period for statute of limitations did not constitute "extraordinary circumstances" justifying relief for inmate serving 99-year sentence).

In its Opinion, the Seventh Circuit determined that the District Court did not abuse its discretion when it

denied Petitioner's Rule 60(b) motion. Consistent with this Court's precedent, the Seventh Circuit considered whether "extraordinary circumstances" existed that would justify relief under Rule 60(b)(6). It concluded that attorney misconduct does not present an extraordinary circumstance. Unfortunately, allegations of attorney negligence or misconduct have become commonplace, and a review of decisions from the Seventh Circuit alone confirms this fact. *Sparrow v. Heller*, 116 F.3d 204, 206 (7th Cir. 1997)(inexcusable neglect is not a basis for relief under Rule 60(b)(6)); *United States v. 8136 S. Dobson St.*, 125 F.3d 1076, 1084 (7th Cir. 1997)(Rule 60(b) relief was not available, where even the intentional misconduct of attorney would be attributed to client); *Easley v. Kirmsee*, 382 F.3d 693, 699 n.5 (7th Cir. 2004)(Rule 60(b)(6) relief is unavailable when attorney negligence is at issue); *Dickerson v. Bd. of Educ. of Ford Heights, Ill.*, 32 F.3d 1114, 1118 (7th Cir. 1994)("Indeed, this court has recently held that counsel's negligence, whether gross or otherwise, is never a ground for Rule 60(b) relief"); *United States v. 7108 West Grand Ave.*, 15 F.3d 632, 634 (7th Cir. 1994)("The clients are principals, the attorney is an agent, and under the law of agency the principal is bound by his chosen agent's deeds"); *Chicago Downs Association, Inc. v. Chase*, 944 F.2d 366, 370-1 (7th Cir. 1991)(rejecting argument that counsel's gross negligence should not be attributed to the client); *Tolliver v. Northrop Corp.*, 786 F.2d 316, 319 (7th Cir. 1986)(argument that attorney was "asleep on the job" did not justify Rule 60(b) relief because "a litigant is bound by his lawyer's acts").

Of course, the Seventh Circuit's Opinion is consistent with this Court's longstanding policy, as expressed in *Link:*

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on his client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

Link v. Wabash Railroad Co., 370 U.S. 626, 633-34 (1962), quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1880). Further, this Court noted that any other rule would work an injustice inasmuch as it would visit the sins of the plaintiff's lawyer upon the defendant. *Id.* at n. 10. Indeed, Justice Black in dissent well understood the rule laid down in *Link*: clients must always suffer for the mistakes of their lawyers. *Id.* at 648. Accordingly, *Link* is virtually indistinguishable from the Seventh Circuit's decision in *United States v. DiMucci*, which holds the client responsible for its attorney's conduct in any context. 879 F.2d at 1496.

Nor has this Court retreated from *Link* in the decades since it was decided. As noted previously, in

National Hockey League, this Court affirmed a dismissal entered as a sanction under Rule 37 as a result of counsel's wilful misconduct in connection with their responsibilities in discovery. 427 U.S. at 643. In *United States v. Boyle*, 469 U.S. 241, 242 (1985), this Court held the client responsible for his attorney's misconduct, notwithstanding assertions that the attorney misled the client. In that case, the executor of a will retained an attorney to handle the estate, provided his attorney with all relevant information and records for the purposes of filing a federal estate tax return, and repeatedly asked the attorney about the proceedings and the preparation of the tax return. *Id.* The attorney advised that the tax return would be filed in a timely manner. *Id.* at 243. The return ultimately was filed three months late, and the IRS assessed penalties and interest against the executor pursuant to statute. *Id.* at 243. The executor paid the penalty, and brought suit seeking a refund, alleging his failure to file the return on time was "due to reasonable cause," (an exception to the penalty statute) *e.g.*, his reliance upon his attorney. *Id.* at 244 The district court granted the refund, and a divided Seventh Circuit affirmed, issuing three opinions. *Id.* On grant of *certiorari*, this Court unanimously reversed and held that the executor was responsible for the omissions of his attorney. *Id.* at 251-252.[2] Thereafter, in *Pioneer Investment Services Co.*, the Court affirmed the Sixth

2. In his concurring opinion in the Seventh Circuit, Judge Coffey made the argument Petitioner makes here, that the misdeeds of the lawyer (which Judge Coffey characterized as "inefficiency, negligence, carelessness and misleading conduct") should not be imputed to the client. *Boyle v United States*, 710 F.2d 1251, 1255-56 (7th Cir. 1983). As noted, this Court unanimously rejected such a theory.

Circuit's determination that an attorney's inadvertent failure to file a proof of claim by the claim bar date could constitute "excusable neglect" for the purposes of Fed. R. Bank. P. 9006(b)(1). 507 U.S. at 397. In so doing, however, all nine justices of the Court once again reaffirmed *Link* and found that any attempt by the circuit court to shield a party from the consequences of its attorney's conduct constituted error. *Id.* at 396-397, 405-406.

Seeking to avoid the great weight of authority that ultimately dooms its claims, Petitioner relies primarily upon a district court decision, *In Re Robenson*, 124 B.R. 757 (N.D. Ill. 1991), which dealt with an appeal from several bankruptcy court orders. The district court granted relief from judgment pursuant to Rule 60(b)(6) on the grounds of "unconscionable" attorney neglect. 124 B.R. at 759. However, a district court decision does not have *stare decisis* effect; it is not a precedent. *Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 457 (7th Cir. 2005). Moreover, as noted by the Seventh Circuit in its Opinion in this case, the reasoning of *In Re Robenson* was repudiated over 15 years ago in *7108 West Grand Ave.*, 15 F.3d at 634. Petitioner also cites, in passing, *Boughner v. Secretary of Health, Education & Welfare*, 572 F.2d 976 (3d Cir. 1978), and *Jackson v. The Washington Monthly, Co.*, 569 F.2d 119 (D.C. Cir. 1977), as cases that stand with *Robenson* for the proposition that attorney neglect may be a basis for relief under Rule 60(b)(6). However, each of these cases predates this Court's unanimous reaffirmance of *Link* in *Pioneer*. Moreover, each of these cases is distinguishable on their facts. In *Boughner*, it was determined that the attorney in question effectively

abandoned 52 separate clients, and the six movants in that case actually raised their Rule 60(b)(6) arguments in the district court, and did not wait to raise them for the first time on appeal as Petitioner did here. *Boughner*, 572 F.2d at 977. In *Jackson*, the circuit court noted that, unlike *Link* and the District Court's Order in this case, the record did not reveal a course of protracted neglect. *Jackson*, 569 F.2d at 121.

This Court's precedent is clear that Petitioner's appropriate remedy for its attorney's alleged neglect is not relief against Traditional Baking under Rule 60(b), but rather a suit for malpractice against that attorney. *Link v. Wabash Railroad Co.*, 370 U.S. at 634, n.10 ("[I]f the attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice"). Such a rule is consistent with the decision of the Seventh Circuit in this case and the authorities it relied upon as well. See *7108 West Grand Ave.*, 15 F.3d at 633 ("Malpractice, gross or otherwise, may be a good reason to recover from the lawyer, but does not justify prolonging litigation against the original adversary").

Petitioner's ultimate argument–that it should not be penalized for the omissions of its own attorney–ignores the well-established authority of this Court and, contrary to law, would have the Court visit the alleged sins of Petitioner's attorney upon Traditional Baking – the only innocent party in this litigation. The federal courts are understandably reluctant to endorse such a perverse result. *Link*, 370 U.S. at 634 n. 10.; *Easley*, 382 F.3d at 699 n.6 (if a party's attorney was negligent, the party should not be permitted to shift the burden

of its agent's neglect onto either its opponent or the district court). This Court should reject Petitioner's arguments and deny the Petition for Writ of *Certiorari*.

As outlined above, the Seventh Circuit's Opinion affirming the District Court is entirely consistent with the previous decisions of this Court that a party must always be held accountable for the acts or omissions of its attorney. Moreover, since Petitioner does not assert that a circuit split exists or that the Seventh Circuit so far departed from the usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power, Petitioner has failed to present a compelling reason for this Court to grant *certiorari* in this case. Accordingly, the Petition for Writ of *Certiorari* should be denied.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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